Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

STATE OF NEBRASKA,

Petitioner,

v.

JOHN M. REEDER,

Respondent.

Petition For Writ Of Certiorari To Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the good faith exception created by *United States v. Leon*, 468 U.S. 897 (1984), be avoided by shifting the ultimate responsibility for the reasonableness of the search from the neutral magistrate to the officer executing the affidavit seeking a warrant?

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THIS CASE

Official Report.

The decision of the Nebraska Supreme Court in question here is reported at *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (2/2/96). Appendix at 1. That court found (1) there was not probable cause to issue the search warrant and (2) the evidence seized in reliance on it should have been suppressed because the *Leon* good faith exception did not apply where the officer executing the affidavit should have known it did not establish probable cause. It reversed the decision of the Nebraska Court of Appeals, which had affirmed Reeder's convictions, and remanded the matter for dismissal.

Unofficial Reports.

The unreported decisions reversed by the decision of the Nebraska Supreme Court are:

1. *State v. Reeder*, decision of the Nebraska Court of Appeals (5/30/95) (not designated for permanent publication). Appendix at 22. That court found there was not probable cause for the search warrant issued, but the evidence seized was admissible under the *Leon* good faith exception to the Exclusionary Rule.

2 Orders of the District Court of Platte County, Nebraska, Case No. 3928:

   a. Search warrant (September 26, 1993). Appendix at 44.

b. Order overruling Reeder's motion to suppress evidence. Appendix at 15.

c. Order at bench trial overruling Reeder's objection to admission of exhibits seized during search pursuant to search warrant (September 26, 1993). Appendix at 40.

d. Judgment and Sentence (September 14, 1994). Appendix at 16.

GROUND FOR JURISDICTION

A.

The opinion of the Nebraska Supreme Court in question here was filed February 2, 1996. In it that court interpreted the good faith exception in *United States v. Leon*, 468 U.S. 897 (1984), as shifting the ultimate responsibility for the Fourth Amendment reasonableness of a search from the neutral magistrate to the officer executing the affidavit seeking a warrant.

B.

The State of Nebraska's motion for rehearing was filed February 9, 1996, and overruled by the Nebraska Supreme Court on March 13, 1996. (A motion for rehearing is timely under Rule 13.A. of the Nebraska Supreme Court if it is filed within 10 days of the release of the opinion, as was done in the present case.)

C.

Jurisdiction is conferred on this Court to consider this matter by 28 U.S.C. § 1257 and Rules 13.1 and 13.3 of this Court.

Review is sought under Rule 10.(c) of this Court: a state court has decided an important question of federal law that has not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISION AND COURT-MADE RULES INVOLVED

Constitutional Provision.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment IV.

Rules Made by This Court.

The Exclusionary Rule.

Evidence acquired in an illegal warrantless search of a defendant's home must be returned to him and cannot be used as evidence against him in a criminal case.

Weeks v. United States, 232 U.S. 383, 398-99 (1913).

The Good Faith Exception to the Exclusionary Rule.

The Exclusionary Rule can be modified somewhat without jeopardizing its ability to perform its intended functions by admitting evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate which is ultimately found to be unsupported by probable cause.

United States v. Leon, 468 U.S. 897, 905 (1984).

The Not Objectively Reasonable Exception to the Good Faith Exception.

To come within the good faith exception, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable.

Leon at 919-23.

STATEMENT OF THE CASE

The facts.

On September 26, 1993, a drug investigator for the Nebraska State Patrol executed an Affidavit and Application for Issuance of a Search Warrant. Appendix at 48. At 11:06 p.m. that date a district judge, "satisfied that probable cause exi[s]ts," issued a search warrant to search John M. Reeder, his residence and his van for specified items related to dealing in drugs. Appendix at 44. A Return and Inventory was filed on October 5, 1993, reciting 26 items seized pursuant to that search warrant on September 26,

1993, including cocaine snow-seal, a revolver, box of sandwich bags, triple beam scale and $1080.00 in U.S. currency. Appendix at 46.

The federal question.

The federal question posed to this Court (whether the evidence seized pursuant to a search warrant should be suppressed to enforce the Fourth Amendment) was first presented to the District Court of Platte County, Nebraska, as a Motion to Suppress Evidence in Case No. 3928. Appendix at 59. Defendant asked the court to prohibit introduction or use of items seized by virtue of a search warrant issued on September 26, 1993, "for the reason that said searches and seizures violated defendant's right to be free from unreasonable searches and seizures as guaranteed to him by the Fourth and Fourteenth Amendment to the Constitution of the United States of America, and by Article I, Section 7, of the Nebraska Constitution. *Id.* After an evidentiary hearing on that motion, the court overruled the motion. Appendix at 15.

At his bench trial, the Defendant renewed his objection to the court's consideration of any evidence seized from his residence, person or vehicle on the date of his arrest for the reason those seizures violated his constitutional right to be free from unreasonable searches and seizures. Appendix at 40. That objection was deemed continuing throughout the course of the trial. *Id.* Exhibits 2-10 were items listed on the return and inventory. Appendix at 61 and 46. The Defendant had no objection to those exhibits when they were offered other than his

continuing objection which was overruled in each instance and the exhibits were received. Appendix at 40.

The Defendant was convicted of Possession with Intent to Deliver a Controlled Substance-Cocaine and Possession of a Firearm by a Felon or Fugitive. Appendix at 16.

On appeal to the Nebraska Court of Appeals, the Defendant assigned two errors: (1) overruling his motion to suppress and (2) receiving into evidence at his trial over his objection items seized as a result of the searches of his residence and person. Appendix at 42.

The Nebraska Court of Appeals found the affidavit submitted with the application for the search warrant lacked probable cause, but the evidence need not be suppressed because it came within the good faith exception in *United States v. Leon*, 468 U.S. 897 (1984). The court affirmed the conviction. *State v. Reeder*, (not designated for permanent publication) (May 30, 1995). Appendix at 22.

The Defendant petitioned for further review by the Nebraska Supreme Court, assigning as error that the decision of the Nebraska Court of Appeals was in error for incorrectly applying the "good faith exception" in *Leon*. Appendix at 43.

The Nebraska Supreme Court accepted the matter for further review and issued a decision reversing and remanding the case with directions to dismiss. *State v. Reeder*, 249 Neb. 207, 543 N.W.2d 429 (February 2, 1996). Appendix at 1. The Court found the Nebraska Court of Appeals was correct in finding the affidavit failed to

establish probable cause, but wrong in finding the evidence admissible under the good faith exception to the Exclusionary Rule in *Leon*. Appendix at 8. Citing *Leon* for the objective reasonableness standard "which 'requires officers to have a reasonable knowledge of what the law prohibits,' " the Court found it was entirely "unreasonable" for the investigator to rely on the affidavit he presented in support of the search warrant. Appendix at 9.

On February 9, 1996, the State of Nebraska moved for a rehearing by the Nebraska Supreme Court; it was overruled on March 13, 1996. Appendix at 39.

The State now petitions this Court to grant certiorari to clarify the "not objectively reasonable" exception to the good faith exception to the Exclusionary Rule so it is not emasculated by requiring the affiant to know more law than the magistrate who issues the search warrant.

ARGUMENT

THE "OBJECTIVELY REASONABLE" STANDARD NEEDS TO BE CLARIFIED IF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE FOR SEARCHES CONDUCTED PURSUANT TO A SEARCH WARRANT, LATER FOUND INVALID, IS TO BE MORE THAN AN ILLUSION.

The Fourth Amendment of the United States Constitution provides in part that the right of the people to be secure in their houses against unreasonable searches and seizures shall not be violated and "no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

A. This Court fashioned the Exclusionary Rule to enforce the Fourth Amendment.

Until *Weeks v. United States*, 232 U.S. 383 (1913), courts did not concern themselves with how evidence offered in cases before them was acquired. *Id.* at 393-397. In that case this Court held that evidence acquired in an illegal **warrantless** search of Weeks' home must be returned to him and could not be used as evidence against him in a criminal case. *Id.* at 398-99.

The Fourth Amendment does not require the government to get a warrant for every search. Nevertheless, this Court has expressed a strong preference for a search warrant because it provides the detached scrutiny of a neutral magistrate as a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime. *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

Although great deference should be given to a magistrate's determination of probable cause for issuing a search warrant, *Spinelli v. United States*, 393 U.S. 410, 419 (1969), that deference does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based, *Franks v. Delaware*, 438 U.S. 154, 165 (1978); into whether the magistrate performed his neutral and detached function and did not serve merely as a rubber stamp for the police, *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); and into whether the affidavit provided

the magistrate with a substantial basis for determining the existence of probable cause, *Illinois v. Gates*, 462 U.S. 213, 239 (1983). A finding of knowing or reckless falsity of the affidavit or a negative finding on either of the other two grounds may lead to a finding that a search warrant was invalid. *Id.* at 238-39. Except in the first instance, this Court has applied the Exclusionary Rule without considering whether Fourth Amendment interests would be advanced. *United States, v. Leon*, 468 U.S. 897, 915-16 (1984).

B. In *Leon* this Court allowed a good faith exception to the Exclusionary Rule for searches conducted pursuant to a search warrant later found invalid.

In *Leon*, this Court revisited the judge-made Exclusionary Rule to decide whether it should be modified so as not to bar the use by the prosecution of evidence obtained by officers acting in reasonable reliance **on a search warrant** issued by a detached and neutral magistrate which was ultimately found to be unsupported by probable cause because the information included in the affidavit was fatally stale and failed to establish the informant's credibility. *Id.* at 904. This Court concluded that, in the Fourth Amendment context, the Exclusionary Rule can be modified somewhat without jeopardizing its ability to perform its intended functions. *Id.* at 905.

In reaching that conclusion in *Leon* this Court reasoned that since the Exclusionary Rule was designed to deter police misconduct rather than to punish the errors of judges and magistrates, *id.* at 916, excluding evidence

seized pursuant to a warrant ordinarily will not serve those Fourth Amendment interests. *Id.* at 916-17.

C. For the good faith exception to apply, reliance on a search warrant later found invalid has to be "objectively reasonable."

This Court admitted that normally a warrant issued by a magistrate suffices to establish that a law enforcement officer has acted in **good faith** in conducting the search, but the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be **objectively** reasonable, cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). *Leon* at 922. (Good faith has both an objective and a subjective aspect: the objective element involves a presumptive knowledge of and respect for basic unquestioned constitutional rights and the subjective component refers to permissible intentions. *Harlow* at 815.) Only the objective element is considered in determining whether to exclude evidence seized pursuant to an invalid search warrant. *Leon* at 921 n.23. The question is: whether a reasonably well-trained officer (who provided information material to the probable cause determination, who obtained the warrant or who executed it) would have known that the search was illegal **despite** the magistrate's authorization. *Id.* at n.23 and n.24.

Suppression is an appropriate remedy if the magistrate in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; where the issuing magistrate wholly abandoned his

judicial role; the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable (not objective good faith to rely on it); or the warrant fails to particularize the place to be searched or the things to be seized so that executing officers cannot reasonably presume it to be valid. *Id.* at 923.

This Court refused to adopt the recommendation of the Attorney General's Task Force on Violent Crime "that evidence obtained pursuant to and within the scope of a warrant is prima facie the result of good faith on the part of the officer seizing the evidence." *Id.* at 920 n.21. Nevertheless, it recognized that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* at 921.

The challenge then is how to determine when an error by the officer will contribute to the deterrence of Fourth Amendment violations. It would be speculative, this Court said, to argue that if the Exclusionary Rule is applied in cases where the police failed to demonstrate probable cause in the warrant application it would deter future inadequate presentations or "magistrate shopping" or that suppressing evidence obtained pursuant to a technically defective warrant supported by probable cause might encourage officers to scrutinize more closely the form of the warrant and to point out suspected judicial errors. *Id.* at 918. So it held that in each case in which the warrant is found invalid, suppression of the evidence should be ordered "only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Id.*

The Exclusionary Rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id.* at 919. The standard of reasonableness this Court adopted "is an objective one." *Id.* at n.20. It "requires officers to have a reasonable knowledge of what the law prohibits." *Id.* "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id.* at 921. The evidence obtained from a search should be suppressed " 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.' " *Id.* at 919.

This Court cited several cases addressing good-faith immunity under 42 U.S.C. § 1983 and harmless error to illustrate the discretion courts have in conforming their decision-making processes to the exigencies of particular cases. *Id.* at 924. Factors the courts may consider are: whether the officer knew or reasonably should have known the action he took would violate the constitutional rights of the person whose property was to be searched or he took the action with the malicious intention of causing a deprivation of the constitutional rights or other injury to that person, *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975); *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (officer not expected to predict the future course of constitutional law); *Milton v. Wainwright*, 407 U.S. 371, 382 (1972) (officer expected to know a constitutional right recognized for four decades); *Coleman v. Alabama*, 399 U.S. 1, 3 (1970) (a subsequent constitutional decision held not applicable).

Considering similar factors when determining whether to admit evidence under the "objectively reasonable" exception to the good faith exception to the Exclusionary Rule, it may be "objectively reasonable" to require an officer executing an affidavit for a search warrant to know the affidavit submitted for a search warrant must show probable cause to support a search warrant valid under the Fourth Amendment. It may be "objectively reasonable" to require that officer to know probable cause is "a fair probability that contraband or evidence of a crime will be found in a particular place," a "totality of the circumstances" standard which is less demanding than those used in more formal legal proceedings. *Illinois v. Gates*, 462 U.S. 213, 236-39 (1983). In that case this Court recognized:

> "The process [of determining whether there is probable cause] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same – and **so are law enforcement officers**. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

(Emphasis added.) *Illinois v. Gates* at 231-32, quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981).

This Court has also recognized that affidavits are normally drafted by nonlawyers in the midst and haste of

a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. *United States v. Ventresca*, 380 U.S. 102, 108 (1965), quoted in *Illinois v. Gates* at 235.

This Court abandoned the "two-pronged test" established by its decisions in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). *Illinois v. Gates* at 238. Thus, it would not be "objectively reasonable" to require an officer seeking a search warrant to know the subtleties of that test.

The detached and neutral magistrate who has authority to issue a search warrant on a showing of probable cause is free to draw the usual inferences which reasonable men draw from facts and circumstances set out in the affidavit. *Aguilar v. Texas* at 111. Officers engaged in the often competitive enterprise of ferreting out crime are not at liberty to do so. *Id.*

If the reviewing court finds insufficient evidence in the affidavit to support the magistrate's judicial finding of probable cause and holds the search warrant invalid, how is it "objectively reasonable" to require the officer who submitted the affidavit to the magistrate to anticipate how a reviewing court at some later date will view his preliminary judgment that the totality of the circumstances recited in the affidavit show "a fair probability that contraband or evidence of a crime will be found in a particular place"?

When the concept of probable cause is not readily, or even usefully, reduced to a neat set of legal rules, *Illinois v. Gates, id.*, how is it "objectively reasonable" to require

the officer executing an affidavit to make a more accurate judgment about the sufficiency of the information in the affidavit to establish probable cause than the magistrate who issues the search warrant based on that affidavit? How will it further the purposes of the Fourth Amendment to lay the blame for an invalid search warrant on the officer who executed the affidavit?

D. The good faith exception to the Exclusionary Rule is illusory if "objectively reasonable" requires an officer to know more law than the magistrate issuing the search warrant.

In limiting the suppression remedy to allow an exception for seizures pursuant to a warrant that is later found invalid, this Court specifically left "untouched the probable-cause standard and the various requirements for a valid warrant." *Leon* at 923.

1. Whether to exclude the evidence is a separate issue from whether there has been a Fourth Amendment violation.

Whether the exclusionary sanction is appropriately imposed in a particular case is a separate issue from whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct; whether to apply the Exclusionary Rule is to be resolved by weighing the costs and benefits of barring the prosecution from using evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective. *Leon* at 906-07.

> The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, ibid., and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." . . . The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." . . .

Id. at 906.

In resolving that second issue (whether to exclude the evidence seized under a search warrant subsequently held invalid) this Court in *Leon* said:

> Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of judge and jury.

Id. at 907. Indiscriminate application of the exclusionary rule may well generate disrespect for the law and administration of justice. *Id.* at 908.

Thus, whether to exclude the evidence seized in the execution of a search warrant issued by a detached and neutral magistrate is a separate issue from whether there has been a Fourth Amendment violation because there was not probable cause to issue the warrant.

2. Those issues are not really separated where the officer executing the affidavit seeking a warrant is held to a higher standard than the magistrate who issues the warrant.

In fashioning the good faith exception to the Exclusionary Rule when the evidence was seized pursuant to a search warrant, this Court reserved an exception to that exception: the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be "objectively reasonable." *Leon* at 922. The examples this Court gave of circumstances that would undermine reliance on the warrant were that the warrant application had been previously rejected by a different magistrate, the officer knew information in the affidavit was false, the warrant failed to particularize the place to be searched or the things to be seized or the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 922-23 and n.23.

In the present case the Nebraska Supreme Court agreed with the Nebraska Court of Appeals that there had been a violation of Fourth Amendment rights. That was because that Court found the affidavit lacked any information pertaining to the reliability of the confidential informant and his close personal friend who gave information about Defendant's recent possession of a large quantity of cocaine and his sale of some of it to the CI's close personal friend. However, the Nebraska Supreme Court disagreed with the Nebraska Court of Appeals on whether to apply the Exclusionary Rule.

There was no evidence the affidavit had previously been rejected by a different magistrate. There was no evidence any information in the affidavit was false or that the officer knew it was false. The warrant particularized the places to be searched and the things to be seized. The Nebraska Supreme Court applied the Exclusionary Rule because it found the affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely "unreasonable" for this well-trained police officer. That finding of "unreasonable" was made notwithstanding the fact the issuing magistrate and trial judge who denied Defendant's motion to suppress found probable cause to issue the warrant thereby showing that reasonable minds differed in whether they thought there was "a fair probability that contraband or evidence of a crime will be found in a particular place."

The warrant exception to the Exclusionary Rule is illusory if the "not objectively reasonable" exception to that exception is interpreted, as the Nebraska Supreme Court interpreted it, to hold the officer executing the affidavit to greater knowledge of the law than the magistrate who issued the search warrant. That is the consequence of imposing the Exclusionary Rule because the officer did not catch a nuance in the law either overlooked by the magistrate or because the magistrate's judgment differed from that of the appellate court on whether there was "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates* at 237-39. Once issued, the officer has a sworn duty to carry out the provisions of the judicial

mandate to search. *Leon* at 920 n.21. Thus, it is "objectively reasonable" for the officer or other officers to do so.

The good faith exception will never apply if "objectively reasonable" is interpreted as the Nebraska Supreme Court has done in the present case to require a police officer to have a greater knowledge of the law than the detached and neutral magistrate to whom the officer's affidavit must be submitted. By that court's unbending application of the exclusionary sanction to enforce ideals of governmental rectitude, it has impeded unacceptably the truth-finding function of the judge who had a substantial basis for issuing the warrant in this case and has needlessly punished law enforcement officers who relied on that warrant to gather evidence of criminal acts which there was a strong probability they would find.

Clearly this Court needs to clarify further the "not objectively reasonable" exception to the good faith search-conducted-pursuant-to-a-warrant-subsequently-found-invalid exception to the Exclusionary Rule to avoid giving a windfall to petitioners who, like the Defendant in the present case, have been tried and found guilty beyond a reasonable doubt.

CONCLUSION

The State of Nebraska urges this Court to grant its petition for a writ of certiorari to the Nebraska Supreme Court because that court has decided an important question of federal law that has not been, but should be, settled by this Court.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V. JOHN M. REEDER, APPELLANT.
249 Neb. 207, 543 N.W.2d429

Filed February 2, 1996. No. S-94-848.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and WARREN, District Judge, Retired, on appeal thereto from the District Court for Platte County, ROBERT R. STEINKE, Judge. Judgment of Court of Appeals reversed and remanded with directions to dismiss.

Kirk E. Naylor, Jr., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson

for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

This is an appeal by John M. Reeder from the convictions and sentences of the felony offenses of possession of cocaine with intent to deliver and felon in possession of a firearm. At trial, Reeder filed a motion to suppress evidence seized from his residence, claiming that the search warrant executed to search the residence was not based on probable cause. The district court for Platte County overruled Reeder's motion to suppress, concluding that the warrant was based on probable cause. The district court, in a bench trial, subsequently found Reeder guilty.

Reeder appealed to the Nebraska Court of Appeals, which affirmed. *State v. Reeder*, 95 NCA No. 22, case No. A-94-848 (not designated for permanent publication). The Court of Appeals held that the search warrant was not based on probable cause, but concluded that the evidence seized pursuant to the warrant was nonetheless admissible pursuant to the "good faith" exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Reeder successfully petitioned this court for further review.

Reeder assigns one error to the Court of Appeals' decision. He contends that the Court of Appeals incorrectly applied the good faith exception set forth in *Leon* to prevent the exclusion of the evidence obtained pursuant to the search warrant. We agree with the Court of Appeals that the affidavit in support of obtaining the search warrant failed to establish probable cause; however, we disagree with the Court of Appeals that the *Leon* good faith exception applies to the circumstances of this case. Therefore, the evidence should have been suppressed, and we reverse the decision of the Court of Appeals and remand the cause with directions to vacate Reeder's convictions and dismiss the charges against him.

At 11:06 p.m. on September 26, 1993, a search warrant was issued permitting the search of Reeder, his residence, and a red 1979 Chevrolet van with the license plate number NE 25-G951. Investigator Galen D. Svoboda, a drug investigator for the Nebraska State Patrol, accompanied by two other officers, executed the warrant. The following items were seized as a result of these searches: over 30 grams of cocaine and related drug

paraphernalia, a cocaine cutting agent known as inositol, a triple-beam scale, a revolver with ammunition, large firecrackers, and more than $1,000 in cash.

The warrant authorizing the search was based solely on a September 26, 1993, sworn affidavit and application of Investigator Svoboda. The affidavit stated various grounds in support of the issuance of the warrant. Five of the grounds supporting the warrant involved information anywhere from 4 months to 10 years old: (1) In 1983, a wiretap indicated Reeder was involved in cocaine distribution; (2) in 1990, an informant stated that Reeder was a supplier of drugs; (3) in 1992, a reliable informant stated that Reeder was a cocaine dealer in Columbus; (4) in 1992, another confidential informant stated that Reeder distributed cocaine in Columbus and that the informant had received cocaine from Reeder in the past; the confidential informant also stated that three other parties – David Markovic, a confidential informant known as CI29-09-25-93 (CI), and the CI's close personal friend – had all obtained cocaine from Reeder; and (5) in March 1993, according to another reliable confidential informant, Reeder was a distributor of cocaine in Columbus.

The sixth paragraph of the affidavit pertained to information from the CI regarding alleged current drug activities of Reeder. Paragraph six stated:

> On 09-25-93, affiant received information from Sgt. Todd Thalken of the Columbus Police Department. Thalken had contact with CI29-09-25-93. At this time Thalken believed CI29-09-25-93 to be under the influence of alcohol because Thalken could smell the odor of an alcoholic beverage emitting from CI29-09-25-93.

CI29-09-25-93 stated to Thalken, without being prompted or threatened, that there is an individual by the name of John Reeder who lives in an old school house North of Columbus, NE who deals in large quantities of cocaine and is currently in ximately [sic] one pound of cocaine in his home. CI29-09-25-93 stated to Thalken that CI29-09-25-93 has purchased cocaine from Reeder in the past but is currently trying to quit using cocaine; that Reeder often goes to Omaha, Ne to a place that fixes motorcycles to get cocaine; that Reeder keeps the cocaine well hidden in his bedroom; Reeder does not use scales to measure off cocaine but, "eyeballs it" and if you want the cocaine weighed off you have to bring your own scale. CI29-09-25-93 stated that Reeder told CI29-09-25-93 that if his place was ever searched it would require a drug dog; that Reeder has threatened people in the past who may give information about his dealings to the Police; and that Reeder has boasted that he has a woman who works in the Platte County Courthouse who knows about search warrant affidavits and informs Reeder about the affidavits. Thalken states that CI29-09-25-93 did not actually see this one pound of cocaine but spoke to a close personal friend, who CI29-09-25-93 named to Thalken and is known to affiant. This close personal friend told CI29-09-25-93 that this close personal friend purchased cocaine from John Reeder, at his residence, on 09-23-93 and that Reeder had a "rock" of cocaine about one pound in size. Thalken states that Thalken has know[n] CI29-09-25-93 for many years and that CI29-09-25-93 has never made false statements to Thalken before but that CI29-09-25-93 has never provided substantial information in the

past. CI29-09-25-93 also told Thalken that this close personal friend would not assist in any investigation and should not be contacted.

The remainder of the affidavit stated that the "close personal friend" was the same person referred to by the other informants and that this person was known to Investigator Svoboda. The affidavit also stated that Investigator Svoboda had verified Reeder's ownership of the van often parked in front of Reeder's alleged residence and that he had verified the telephone number to the residence. Investigator Svoboda also stated in the affidavit that Reeder's family members advised a Platte County deputy sheriff on an unknown date that Reeder was violent, carried a pistol, and beat his sister. Investigator Svoboda also stated in the affidavit that Reeder's criminal history revealed an assault conviction in 1967 and a conviction of delivery of controlled substances in 1987.

On October 26, 1993, Reeder was charged with four felonies: possession with the intent to deliver a controlled substance-cocaine, failure to affix drug tax stamps on a controlled substance, possession of a firearm by a felon or fugitive, and first degree possession of explosives.

On March 4, 1994, Reeder moved to suppress the evidence obtained pursuant to the search warrant, alleging that the warrant was not based on probable cause. This motion was overruled by the district court, which concluded that the warrant was based on probable cause.

At a trial before the court, jury trial being waived, Reeder made a continuing objection to the admission of

the evidence obtained pursuant to the warrant. The district court found Reeder guilty of possession with intent to deliver a controlled substance-cocaine-and possession of a firearm by a felon or fugitive.

The Court of Appeals reviewed the trial court's overruling of Reeder's motion to suppress and the court's decision to admit the evidence obtained pursuant to the warrant. The Court of Appeals held that the information in the warrant regarding alleged activity from 1983 through May 1993 was stale, that the information provided by the CI was unreliable, and that, therefore, no probable cause existed to justify issuance of the warrant. However, the court concluded that the evidence need not be suppressed because it fell under the good faith exception to the exclusionary rule set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). Based on the *Leon* good faith exception, the Court of Appeals affirmed the district court's ruling.

"A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion. . . . " *State v. Grimes*, 246 Neb. 473, 478, 519 N.W.2d 507, 513 (1994). "It is beyond question that a motion to suppress is the appropriate remedy to exclude evidence which has been obtained through an invalid search warrant." *State v. Utterback*, 240 Neb. 981, 984, 485 N.W.2d 760, 766 (1992). However, evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral and detached magistrate later found to be invalid is nonetheless admissible. *Leon, supra.*

We agree with the Court of Appeals' holding that the information relating to alleged previous activities of

Reeder was stale information that could not be used to support probable cause for the search in question. "Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." *State v. Hodge and Carpenter*, 225 Neb. 94, 101, 402 N.W.2d 867, 873 (1987). As the Court of Appeals found, the information in the affidavit of Reeder's alleged prior drug activities was not closely related in time and therefore was insufficient to justify probable cause for the search warrant.

We also agree with the Court of Appeals' holding that the information in the affidavit concerning the CI was insufficient to prove probable cause to justify the issuance of the search warrant.

> When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.

Grimes, 246 Neb. at 479, 519 N.W.2d at 513.

Generally, there are four methods of establishing the reliability of an informant: (1) The informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement against his or her penal interest, or (4)

the informant's reliability or the reliability of the information given by the informant is established by a police officer's independent investigation. *Grimes, supra.*

As the Court of Appeals found, the affidavit provides no substantial basis for establishing the credibility of the CI or of his close personal friend who provided information pertaining to Reeder's alleged drug-related activities. These two had not given reliable information in the past, they were not citizen informants, they did not make definitive statements against any possible penal interest, and no independent investigation as to reliability was conducted by the police. Therefore, as the Court of Appeals found, the affidavit in support of the search warrant failed to establish probable cause.

Although the Court of Appeals was correct in finding that the affidavit failed to establish probable cause, the Court of Appeals erred in determining that the evidence was nonetheless admissible under the good faith exception to the exclusionary rule as set forth in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). As previously stated, under the *Leon* good faith exception, evidence obtained pursuant to an invalid search warrant may nonetheless be admissible if the evidence was obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate.

In regard to an officer's reasonable reliance on the invalid warrant, the test for reasonable reliance is whether the affidavit was sufficient to "'"create disagreement among thoughtful and competent judges as to the existence of probable cause."'" *State v. Parmar*, 231

Neb. 687, 697, 437 N.W.2d 503, 510 (1989) (quoting *U.S. v. Hove*, 848 F.2d 137 (9th Cir. 1988)). Also, this is an objective standard of reasonableness, which "requires officers to have a reasonable knowledge of what the law prohibits." *Leon*, 468 U.S. at 920 n.20. See, also, *United States v. Peltier*, 422 U.S. 531, 95 S. Ct. 2313, 45 L. Ed. 2d 374 (1975).

Pursuant to *Leon, supra*, suppression of the evidence remains appropriate if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role; (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

We find that it was entirely unreasonable for Investigator Svoboda to rely on the affidavit he presented in support of the search warrant. The affidavit simply lacks any information pertaining to the reliability of both the CI and his close personal friend. The affidavit is also lacking in any corroboration to the CI's statement that the close personal friend purchased cocaine 3 days prior to the issuance of the warrant and that Reeder had a "rock" of cocaine about 1 pound in size at the time of the alleged sale.

As the affidavit indicates, the CI was intoxicated at the time he divulged information to Officer Todd

Thalken. The CI gave information based on what the close personal friend allegedly had stated to him and then told Officer Thalken that he should not contact the close personal friend. Officer Thalken could not conclusively state that the CI was a reliable informant. Investigator Svoboda, in his affidavit, also could not conclude that either the CI or the close personal friend were reliable. Instead, he merely stated that he knew both of them.

As to the corroboration by independent investigation, the affidavit failed to contain sufficient information regarding corroboration to support a reasonable reliance on the affidavit. As the Court of Appeals found, the only investigation undertaken by Investigator Svoboda was to obtain incidental information as to Reeder's residence, phone number, and prior criminal history.

It is true that other more reliable informants in the affidavit state in their testimonials that they know the CI and the close personal friend. These informants also state that at the time they gave the information, they knew the close personal friend was receiving drugs from Reeder. However, none of this information relates to any activity conducted by the CI or the close personal friend in the 4 months prior to the warrant issuance date. Moreover, none of the information given by the other informants pertained to the reliability of the CI or the close personal friend.

The Court of Appeals, in its conclusion that the *Leon* good faith exception applied to this case, stated that

> although the affidavit may be lacking probable cause because of a lack of corroboration of the friend's information, the affidavit as a whole

> creates a good faith belief that Reeder was a drug dealer who had made a very recent sale to a known user and regular customer, i.e., the friend.

State v. Reeder, 95 NCA No. 22 at 15, case No. A-94-848 (not designated for permanent publication). The Court of Appeals misconstrues the standard behind the good faith exception. The standard is not whether an officer had a good faith belief that the defendant was a drug dealer, as the Court of Appeals stated; rather, the standard is whether the officer had a good faith belief that the affidavit submitted in support of obtaining the search warrant was based on probable cause. As previously stated, officers must act within the confines of the law and must, when acting on a reasonable belief, know what the law prohibits. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). The law prohibits the issuance of a search warrant based on an affidavit lacking probable cause. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994). Therefore, the affidavit as a whole must create a good faith belief that the affidavit is based on probable cause.

In sum, the information set forth in the affidavit was insufficient to such a degree that Investigator Svoboda was entirely unreasonable in believing that probable cause existed to support the issuance of the warrant. The affidavit fails to set forth any information as to the reliability of the CI's or the close personal friend's statements regarding Reeder's recent drug activities. Investigator Svoboda's failure to set forth In his affidavit any indicia of reliability, combined with the staleness of all other information set forth in the affidavit, prevents any

reasonable reliance on a search warrant obtained on the basis of the affidavit. Therefore, the evidence obtained pursuant to the search warrant should have been suppressed.

Because he was convicted upon illegally obtained evidence, Reeder's convictions are reversed. There being no evidence of Reeder's guilt other than that which was seized pursuant to the invalid warrant, this cause is remanded to the Court of Appeals with directions to remand to the district court with directions to vacate Reeder's convictions and dismiss the charges against him.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WRIGHT, J., dissenting.

I respectfully dissent. In my opinion, the majority has misapplied the good faith exception to the exclusionary rule as articulated in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

The Court held in *Leon* that evidence need not be suppressed when the police obtain it through objective good faith reliance on a facially valid warrant that is later found to lack probable cause. In applying this exception to the exclusionary rule, it is necessary to consider the objective reasonableness of the officers who provide information material to the probable cause determination. *Id.* The test for objective reasonableness is whether the affidavit supporting the warrant was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. *Id.*; *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989).

It is particularly disturbing in the present case that the majority gives no weight to the finding of probable cause by the lower court judges in determining whether the officer acted with objective reasonableness. Investigator Svoboda's good faith belief in the existence of probable cause was confirmed by the judge who issued the warrant. The district court judge affirmed this probable cause finding at the suppression hearing. The Court of Appeals held that although the affidavit lacked probable cause, Investigator Svoboda's actions were objectively reasonable. This demonstrates overwhelmingly that Investigator Svoboda was objectively reasonable in believing that the affidavit established probable cause.

In my view, disagreement among thoughtful and competent judges as to the existence of probable cause should be accorded substantial evidentiary weight in any case where the objective reasonableness of an officer's actions is at issue. The purpose of the exclusionary rule is to deter police misconduct. *Leon, supra*. Suppression of evidence obtained pursuant to a warrant should be ordered only in those unusual cases where exclusion will further the purposes of the rule. *Id*. Where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way. *Id*.

In the case at bar, the affidavit creates a reasonable belief that Reeder was a drug dealer who had made a very recent sale to a known user and regular customer. Thoughtful, competent judges disagreed as to whether this affidavit supported a finding of probable cause. The majority cites no evidence of bad faith or recklessness on the part of Investigator Svoboda. Accordingly, I would

allow the evidence obtained by the officers and would affirm Reeder's convictions.

CONNOLLY, J., joins in this dissent.

IN THE DISTRICT COURT OF
PLATTE COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, -v- JOHN M. REEDER, Defendant.	)))))))	CASE NO. 3928 JOURNAL ENTRY (Filed May 19, 1994)

NOW on this 31st day of March, 1994, this matter came on for hearing on the Defendant's Motion to Suppress Evidence. The State was represented by Bridgitt B. Erickson, Platte County Attorney. The defendant, John M. Reeder, appeared in court with counsel, Kirk E. Naylor, Jr. The Honorable John C. Whitehead presided. Evidence was adduced and arguments of counsel were heard. The matter was then taken under advisement.

The court, being fully advised in the premises, hereby finds and orders that the Defendant's Motion to Suppress Evidence is overruled.

The court further orders the matter be set for jury trial June 27, 1994, at 9:00 a.m.

DATED this 19 day of May, 1994.

AND IT IS SO ORDERED.

BY THE COURT:

/s/ John C. Whitehead
DISTRICT JUDGE

J. Kohl, PCA
#19325

IN THE DISTRICT COURT OF
PLATTE COUNTY, NEBRASKA

THE STATE OF NEBRASKA,	)	CASE NO. 3928
Plaintiff,	)	
-v-	)	SENTENCE AND JUDGEMENT
JOHN M. REEDER,	)	
Defendant.	)	(Filed Sep. 14, 1994)

On the 19th day of November, 1993, this matter came on for arraignment upon the Information filed in this matter. The Honorable John C. Whitehead presided. The State of Nebraska was represented by Bridgitt B. Erickson, Platte County Attorney. The Defendant, John M. Reeder, was present in court with counsel, Kirk Naylor.

Whereupon the above-named Defendant was fully advised of the possible pleas and penalties, and of Defendant's Constitutional Rights which included the rights of proof beyond a reasonable doubt, presumption of innocence, confrontation, calling witnesses and presenting evidence in Defendant's guilt, right to testify or not as Defendant chooses with no comment being made thereon should Defendant choose not to testify, counsel with such counsel at state expense if Defendant could not afford counsel at his expense, the suppression of any evidence or statements which were the fruit of an arrest, search, or confession made or obtained in violation of the protections guaranteed Defendant under the Constitution of the United States or the State of Nebraska, and appeal with a transcript for that purpose. The Court further advised the

Defendant that a plea of guilty or no contest to the allegations set forth in the Information filed waived such rights save and except for the rights to counsel and appeal with transcript. The Court ascertained that a preliminary hearing had been properly waived. Whereupon the Defendant entered pleas of not guilty to the charges set forth in the Information filed in this matter, to-wit:

COUNT I: POSSESSION WITH THE INTENT TO DELIVER A CONTROLLED SUBSTANCE-COCAINE, *Neb. Rev. Stat.* § 28-416 (1) (a), a Class ID Felony;

COUNT II: FAILURE TO AFFIX DRUG TAX STAMP ON A CONTROLLED SUBSTANCE, *Neb. Rev. Stat.* § 77-4309, a Class IV Felony; COUNT III: POSSESSION OF FIREARM BY FELON OR FUGITIVE, *Neb. Rev. Stat.* § 28-1206, a Class IV Felony; and

COUNT IV: FIRST DEGREE POSSESSION OF EXPLOSIVES, *Neb. Rev. Stat.* § 28-1215, a Class IV Felony.

Upon entry of not guilty pleas to the charges, the Defendant requested trial by jury, and the Court set the matter to be tried on February 9, 1994, at 9:00 a.m.

On the 17th day of June, 1994, this matter came on for hearing on the Plaintiff' s Motion to Endorse Additional Witnesses. The Honorable Robert R. Steinke presided. The State was represented by John J. Kohl, Platte County Attorney. The Defendant nor his counsel were present at the hearing. The State's Motion to Endorse Additional Witnesses was granted, and the State was allowed to endorse as additional witnesses in this matter John Cox and Dennis O'Connor.

On the 5th day of July, 1994, this matter came on for Trial by Stipulated Facts. The Honorable Robert R. Steinke presided. The State was represented by John J. Kohl, Platte County Attorney. The Defendant, John M. Reeder, was present with counsel, Kirk Naylor.

A Stipulation reached by both parties in this case was orally read into the record. Whereupon the State dismisses COUNT II: FAILURE TO AFFIX DRUG TAX STAMP ON A CONTROLLED SUBSTANCE, *Neb. Rev. Stat.* § 77-4309, a Class IV Felony; and COUNT IV: FIRST DEGREE POSSESSION OF EXPLOSIVES, *Neb. Rev. Stat.* § 28-1215, a Class IV Felony of the Information filed herein.

The Defendant waives his right to trial by jury in this matter. The Defendant is interrogated, and the court finds the Defendant has waived his rights to trial by jury freely, voluntarily, knowingly, and intelligently, and the Defendant's waiver of his rights to trial by jury is accepted by the court. Matter proceeds to trial. Opening statements are waived by both the State and the Defendant. Evidence was adduced and received by the Court for consideration. Counsel for the State and the Defendant were given an opportunity to present oral arguments. Matter is taken under advisement by the court, with the court to announce its decision in open court on July 13, 1994, at 12:00 noon.

On the 13th day of July, 1994, this matter came on for further hearing. The Honorable Robert R. Steinke presided. The State was represented by John J. Kohl. The Defendant, John M. Reeder, was present with counsel, Kirk Naylor. The court finds the Defendant guilty,

beyond a reasonable doubt as to Count I of the Information POSSESSION WITH THE INTENT TO DELIVER A CONTROLLED SUBSTANCE-COCAINE, *Neb. Rev. Stat.* § 28-416 (1) (a), a Class ID Felony, and further finds the Defendant guilty, beyond a reasonable doubt, as to Count III of the Information, COUNT III: POSSESSION OF FIREARM BY FELON OR FUGITIVE, *Neb. Rev. Stat.* § 28-1206, a Class IV Felony. Sentencing is deferred to August 26, 1994, at 9:00 a.m. pending a presentence investigation by the District Three Probation Office. The Defendant's bond is ordered continued.

On the 26th day of August, 1994, this matter came on for sentencing. The State of Nebraska was represented by John J. Kohl, Platte County Attorney. The Defendant, John M. Reeder, was present in court with his attorney, Kirk Naylor, and given an opportunity to be heard before sentence was imposed. The Honorable Robert R. Steinke presided. Evidence was adduced and received by the Court for consideration. Counsel for the State and the Defendant were given an opportunity to present oral arguments.

The Court being fully advised in the premises and upon allocution, arguments of counsel, and careful consideration of the nature of the offenses which said Defendant has been found guilty as set forth in Count I and Count III of the Information filed in this matter, to-wit:

COUNT I: POSSESSION WITH THE INTENT TO DELIVER A CONTROLLED SUBSTANCE-COCAINE, *Neb. Rev. Stat.* § 28-416 (1) (a), a Class ID Felony;

COUNT III: POSSESSION OF FIREARM BY FELON OR FUGITIVE, *Neb. Rev. Stat.* § 28-1206, a Class IV Felony; and further, after considering the statutory criteria for probation and the statutory punishment permitted in cases as the one at bar, finds that the Defendant, John M. Reeder, is not a fit and proper candidate for a sentence of probation and hereby sentences said Defendant upon conviction of the above-offenses as follows:

COUNT I: POSSESSION WITH THE INTENT TO DELIVER A CONTROLLED SUBSTANCE-COCAINE, *Neb. Rev. Stat.* § 28-416 (1) (a), a Class ID Felony, is sentenced to not less than four (4) years nor more than six (6) years in an institution of the Nebraska Department of Corrections with credit of one (1) day previously served in confinement in this matter.

COUNT III: POSSESSION OF FIREARM BY FELON OR FUGITIVE, *Neb. Rev. Stat.* § 28-1206, a Class IV Felony, sentenced to one (1) year in an institution of the Nebraska Department of Corrections with such sentence to be served concurrent with Count I.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, John M. Reeder, shall be and hereby is sentenced upon conviction of the above-offense as follows:

COUNT I: POSSESSION WITH THE INTENT TO DELIVER A CONTROLLED SUBSTANCE-COCAINE, *Neb. Rev. Stat.* § 28-416 (1) (a), a Class ID Felony, is sentenced to not less than four (4) years nor more than six (6) years in an institution of the Nebraska Department of Corrections with credit of one (1) day previously served in confinement in this matter.

COUNT III: POSSESSION OF FIREARM BY FELON OR FUGITIVE, *Neb. Rev. Stat.* § 28-1206, a Class IV Felony, sentenced to one (1) year in an institution of the Nebraska Department of Corrections with such sentence to be served concurrent with Count I.

The Court further orders that Defendant be taxed the costs of this action. The Defendant's bond is ordered continued until Defendant files his Notice of Appeal, there being no objections from the State.

DATED AND SIGNED at Columbus, Platte County, Nebraska, this 14th day of September, 1994.

IT IS THEREFORE SO ORDERED, ADJUDGED AND DECREED.

/s/ Robert R. Steinke
DISTRICT COURT JUDGE

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA, APPELLEE, V.
JOHN M. REEDER, APPELLANT

Filed May 30, 1995. No. A-94-848.

Appeal from the District Court for Platte County: ROBERT STEINKE, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

SIEVERS, Chief Judge, and MILLER-LERMAN, Judge, and WARREN, District Judge, Retired.

MILLER-LERMAN, Judge.

INTRODUCTION

John M. Reeder appeals the Platte County District Court's denial of his motion to suppress evidence. Reeder asserts that probable cause to issue a search warrant under the Fourth Amendment did not exist. See, U.S. Const. amend. IV; Neb. Const. art. 1, § 7. The contraband seized pursuant to the warrant formed the basis of Reeder's convictions of possession with intent to deliver a controlled substance and possession of a firearm by a felon or a fugitive. For the reasons recited below, we affirm.

FACTUAL BACKGROUND

At 11:06 p.m. on September 26, 1993, a search warrant was issued permitting a search of Reeder, his residence, and a red 1979 Chevrolet van with license plate number NE 25-G951. Reeder was stopped in his vehicle in Columbus, Nebraska, at approximately 11 p.m. and detained until the search warrant was obtained. After the warrant was obtained, Reeder and his vehicle were searched. At approximately 12:44 a.m. on September 27, 1993, a Nebraska State Patrol investigator and other law enforcement officers executed a no-knock search warrant at Reeder's residence. Pursuant to these searches, the following items were found and seized: over 30 grams of cocaine; drug paraphernalia including snow seals, inositol (a cutting agent), and sandwich bags; a triple-beam scale; a revolver with ammunition; large firecrackers; and more than $1,000 in cash.

The warrant which the officers executed authorized a search for controlled substances; cocaine drug paraphernalia; records or other evidence resulting from or relating to drug transactions; packaging materials for controlled substances; weapons, firearms, and ammunition; and scales used to weigh controlled substances.

The sworn affidavit and application of Investigator Galen D. Svoboda, a drug investigator for the Nebraska State Patrol, was dated September 26, 1993, and stated generally the following grounds for the issuance of a search warrant: (1) A wiretap in 1983 showed that Reeder was involved in cocaine distribution; (2) in 1990, an informant stated that Reeder was a supplier of drugs in Columbus; (3) in 1992, a reliable confidential informant

stated that Reeder was a distributor of cocaine in Columbus; (4) in 1992, another confidential informant stated that Reeder was a distributor of cocaine in Columbus, that he had received cocaine from Reeder in the past, and that David Markovic, a confidential informant identified as CI29-09-25-93 (the CI), and the "close personal friend" (the friend) of the CI got cocaine from Reeder; and (5) in March 1993, according to another reliable confidential informant, Reeder was a distributor of cocaine in Columbus and the friend was a cocaine user and obtained drugs from Reeder.

Paragraph six of the affidavit stated:

> On 09-25-93, affiant received information from Sgt. Todd Thalken of the Columbus Police Department. Thalken had contact with CI29-09-25-93. At this time Thalken believed CI29-09-25-93 to be under the influence of alcohol because Thalken could smell the odor of an alcoholic beverage emitting from CI29-09-25-93. CI29-09-25-93 stated to Thalken, without being prompted or threatened, that there is an individual by the name of John Reeder who lives in an old school house North of Columbus, NE who deals in large quantities of cocaine and is currently in possession of approximately one pound of cocaine in his home. CI29-09-25-93 stated to Thalken that CI29-09-25-93 has purchased cocaine from Reeder in the past but is currently trying to quit using cocaine; that Reeder often goes to Omaha, Ne to a place that fixes motorcycles to get cocaine; that Reeder keeps the cocaine well hidden in his bedroom; Reeder does not use scales to measure off cocaine but, "eyeballs it" and if you want the cocaine weighed off you have to bring your own

> scale. CI29-09-25-93 stated that Reeder told CI29-09-25-93 that if his place was ever searched it would require a drug dog; that Reeder has threatened people in the past who may give information about his dealings to the Police; and that Reeder has boasted that he has a woman who works in the Platte County Courthouse who knows about search warrant affidavits and informs Reeder about the affidavits. Thalken states that CI29-09-25-93 did not actually see this one pound of cocaine but spoke to a close personal friend, who CI29-09-25-93 named to Thalken and is known to affiant. This close personal friend told CI29-09-25-93 that this close personal friend purchased cocaine from John Reeder, at his residence, on 09-23-93 and that Reeder had a "rock" of cocaine about one pound in size. Thalken states that Thalken has know[n] CI29-09-25-93 for many years and that CI29-09-25-93 has never made false statements to Thalken before but that CI29-09-25-93 has never provided substantial information in the past. CI29-09-25-93 also told Thalken that this close personal friend would not assist in any investigation and should not be contacted.

In paragraph seven of the affidavit, Svoboda stated that the friend was the same individual mentioned by the other informants. Svoboda stated in paragraph six that this individual was known to him.

Svoboda stated that through his own investigation, he had verified that a van registered to Reeder was often parked at Reeder's alleged residence; that the phone number for this residence was assigned to Jeff Wardenberg, who was allegedly living with Reeder; that someone using this phone had made calls to relatives of Reeder

and to telephone numbers in Omaha; that according to a deputy in the Platte County sheriff's office, Reeder's family members advised the deputy "on an unknown date" that Reeder was violent, "carried a pistol," and "used to intentionally beat up his sister," and that Reeder's criminal history revealed an assault conviction in 1967 and a 1983 conviction of delivery of controlled substances.

Throughout these proceedings, Reeder has challenged the validity of the search warrant. Reeder has argued generally that Svoboda's affidavit to obtain a search warrant failed to establish probable cause for the issuance of a search warrant and that the affidavit contained false, misleading, or incomplete information.

Reeder argues specifically that the information regarding alleged activity from 1983 through May 1993 is stale and that the information supplied by the CI regarding alleged facts in September 1993 based on information from the friend is unreliable.

Reeder filed a motion to suppress, which was overruled. At a trial before the court, he properly preserved his objection to the admission of evidence seized pursuant to the search warrant. After hearing all of the evidence, the district court found Reeder guilty beyond a reasonable doubt of possession with intent to deliver a controlled substance and possession of a firearm by a felon or a fugitive.

ASSIGNMENTS OF ERROR

Reeder makes the following assignments of error: (1) The district court erred in overruling his motion to suppress, and (2) the district court erred in receiving into evidence at trial, over his objection, items seized as a result of the searches of his residence, vehicle, and person which occurred on August 27, 1993.

STANDARD OF REVIEW

[1,2] In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's factual findings unless those findings are clearly erroneous. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Grimes, supra*; *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994).

ANALYSIS

Probable Cause for Issuance of a Search Warrant.

A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded on articulable facts. *Grimes, supra*; *Flores; supra*. A search pursuant to a warrant is presumed to be valid. *Id.* In evaluating a showing of probable cause

necessary to support issuance of a warrant, only probability and not prima facie evidence of criminal activity is required. *Flores, supra*; *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). Probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge. *Flores, supra*.

[3] In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Grimes, supra*; *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993). The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed. *Id.* An appellate court is restricted to consideration of the information and circumstances contained within the four corners of the underlying affidavit. *Grimes, supra*; *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993); *Utterback, supra*. Evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *Id.*

Reeder first argues that the information contained in the affidavit regarding alleged activity from 1983 through May 1993, standing alone, was too stale to support a finding of probable cause to issue a warrant in September 1993. Based on the facts of this case, we agree. The information obtained from several confidential informants that is contained in the affidavit was collected in

1983; on July 27, 1990; in March and November 1992; in March 1993; and on May 31, 1993. The information collected on these dates from confidential informants involved Reeder's alleged drug-related activities on those dates. The search warrant was issued September 26, 1993.

[4] "Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." *State v. Hodge and Carpenter*, 225 Neb. 94, 101, 402 N.W.2d 867, 873 (1987) No more than a reasonable time may have elapsed. *State v. Kallos*, 193 Neb. 113, 225 N.W.2d 553 (1975). In *Hodge and Carpenter, supra*, a search warrant was issued in 1985, and reliable information about the defendants' marijuana possession and cultivation was gathered from 1982 and 1984, as well as up to and including the day before the issuance of a warrant. In *Hodge and Carpenter*, the current information was credible, and the court held that the historical observations tended to establish a pattern of marijuana cultivation and that, viewed as a whole, the information contained in the affidavit was not too stale to establish probable cause for the issuance of a warrant. See, also, *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990); *Kallos, supra*.

In the instant case, the information, other than that supplied by the CI, was 4 months to 10 years old or related to matters imparted "on an unknown date." We are aware of the concurrence to *State v. Groves*, 239 Neb. 660, 474 N.W.2d 789 (1991), which included comment on the significance of activities of a protracted nature and made observations regarding the distinction between consumable and nonconsumable objects. The concurrence

noted that certain drugs were easily and quickly disposed of and, thus, consumable. See, also, *Morrison, supra*; *State v. Meyer*, 209 Neb.757, 311 N.W.2d 520 (1981). Thus, the existence of drugs 6 months prior to the issuance of the search warrant, without more, is stale information and by itself could not support a warrant. The statement in the affidavit that Reeder carried a pistol at an unspecified time, although a pistol is nonconsumable, is indefinite as to time and standing alone does not amount to probable cause to issue a search warrant for weapons. Based upon the totality of the circumstances, the information regarding past activity, standing alone, was not so closely related to the time of the issuance of the search warrant such as to justify a finding of probable cause at the time of issuance. *Hodge and Carpenter, supra*. Without the CI's information obtained from the friend that Reeder was in possession of 1 pound of cocaine and had sold cocaine to the friend within the 3 days before the issuance of the search warrant, the older information alone cannot be used to establish a pattern of drug distribution to justify a current finding of probable cause.

Reeder argues that probable cause to issue the search warrant did not exist because the reliability and basis of knowledge of the CI was not sufficiently documented. He further argues that the information provided by the friend was unfounded in the affidavit. When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the

informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994); *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). The affidavit must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred. *Id.*

[5] There are generally four ways in which the reliability of an informant may be established by a showing in the affidavit to obtain a search warrant. They are that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.*

The affidavit does not show that the CI had given reliable information to police officers in the past. As to the reliability of the CI, Svoboda's affidavit states: "Thalken states that Thalken has know[n] CI29-09-25-93 for many years and that CI29-09-25-93 has never made false statements to Thalken before but that CI29-09-25-93 has never provided substantial information in the past." This statement by Svoboda is not "an averment that the . . . informant had given reliable information in the past." *Utterback*, 240 Neb. at 988, 485 N. W. 2d at 768. A practical, commonsense reading of the affidavit does not permit the inference that the CI had supplied reliable information in the past. See *U.S. v. Foree*, 43 F.3d 1572 (11th Cir. 1995). The only other factual averment in the

affidavit about the CI was that he was under the influence of alcohol at the time he supplied the information.

[6] The second method by which an informant's reliability may be determined is if the informant is a citizen informant. See, *Grimes, supra; Utterback, supra.* A citizen informant is " ' "a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. . . . " ' " *Utterback*, 240 Neb. at 988, 485 N.W.2d at 768 (quoting *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987)). The status of a citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth the circumstances from which the existence of the status of citizen informant can reasonably be inferred. *Utterback, supra.* In the case before us, the affiant does not aver or imply that the CI was a "citizen informant" or that he was "motivated by good citizenship."

The third method of determining the veracity of a confidential informant's information is if he or she has made a statement against penal interest. See, *Grimes, supra; Utterback, supra.* The statement the CI made that he had purchased cocaine from Reeder in the past, but that he was currently trying to quit using cocaine, may implicate the CI in drug-related activities. However, the CI's statement relates to an indefinite time in the past and by its terms is not current. Furthermore, the past purchase of cocaine alone, without an indication of possession and/or distribution under the relevant statutes, does not amount to a statement against penal interest. See Neb. Rev. Stat. §§ 28-416 (Cum. Supp. 1994) and 28-417 (Reissue 1989). See, also, *Utterback, supra.*

The final method to determine an informant's reliability is through corroboration. See, *Grimes, supra; Utterback, supra.* In *Utterback*, the affidavit revealed that the police corroborated that Utterback lived at the described address, that the car in the driveway was registered to him, that the utilities at the house were registered to Utterback's wife, and that Utterback's physical description matched that given by the informant. The Nebraska Supreme Court held:

> If the police had chosen to corroborate the information regarding any criminal activities of Utterback's rather than merely corroborating these innocent details of his life, see *U.S. v. Gibson*, 928 F.2d 250 (8th Cir. 1991), or had the affidavit contained other corroborative sources of information about the same alleged criminal activity of Utterback's, see *United States v. Stanert*, 762 F.2d 775 (9th Cir. 1985), the veracity of the informant might have been established in the affidavit.

Utterback, 240 Neb. at 993, 485 N.W.2d at 771. In *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994), the Nebraska Supreme Court held, based upon the *Utterback* holding, that an affiant's receipt of intelligence reports from other officers indicating certain information was not sufficient corroboration because the nature or basis of the intelligence information was not given.

In the case before us, the Nebraska State Patrol corroborated "innocent details," such as the information that Reeder's vehicle was at Reeder's residence and that the phone at the residence was used to call relatives of Reeder and telephone numbers in Omaha. They also had information that Reeder had a drug conviction that was

more than 9 years old and that he was violent and carried a pistol. There is no independent corroboration of the information that Reeder was currently a distributor of cocaine, was in possession of approximately 1 pound of cocaine, had sold cocaine to the friend in the past 3 days, or had recently sold cocaine to anyone else. Corroboration of any of these "criminal activities" would serve to establish the CI's veracity. The reliability of the CI regarding criminal activity cannot be corroborated from the incidental information obtained by Svoboda contained in the affidavit to obtain the search warrant.

[7] We are aware that under the "totality of the circumstances" standard set out by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), a deficiency in an affidavit relating to either an informant's veracity or an informant's basis of knowledge "may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other [consideration of the standard], or by some other indicia of reliability." *Id.*, 462 U.S. at 233. For example, an "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles [a] tip to greater weight than might otherwise be the case." *Id.* at 234.

[8] In the case before us, according to the affidavit, the CI's basis of knowledge that Reeder possessed 1 pound of cocaine and was selling cocaine was that the friend had so advised the CI. Where an informant's report is not based on personal knowledge, but, rather, on the information of a second individual, the court must determine whether a substantial basis exists for crediting the second individual's information. *U.S. v. Satterwhite,*

980 F.2d 317 (5th Cir. 1992) (citing *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) (White, J., concurring)). Upon reviewing an affidavit which contains hearsay upon hearsay, a magistrate need not categorically reject double hearsay information, or triple hearsay information such as is contained in the instant affidavit, but is called upon to determine whether the information was gained in a reliable way. See *United States v. Smith*, 462 F.2d 456 (8th Cir. 1972).

The judge must be presented with a means of assessing the credibility of Thalken, who provided the information to Svoboda; a means of assessing the veracity of the CI, who spoke with Thalken; and a means of assessing the veracity of the initial source of information – the "close personal friend." See, *Smith, supra; United States v. Roth*, 391 F.2d 507 (7th Cir.1967); *United States v. Carney*, 328 E Supp. 948 (D. Del. 1971); *People v. Pate*, 878 P.2d 685 (Colo. 1994); *State v. Niehaus*, 452 N.W.2d 184 (Iowa 1990).

The observations of Thalken, a police officer, are a reliable basis for a warrant. See, *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980); *State v. Huggins*, 186 Neb. 704, 185 N.W.2d 849 (1971). As discussed above, there was not sufficient means to assess the credibility of the CI. Regarding the friend, the affidavit before us indicates that the friend is known to the affiant; that the friend used cocaine and got cocaine from Reeder; and that the friend was known to the other confidential informants, whose reliability was set forth in the affidavit, as a cocaine user being supplied cocaine by Reeder. The affidavit does not indicate that the friend had given reliable information in the past or that he or she was a citizen informant. See *State v. Grimes*, 246 Neb. 473, 519

N.W.2d 507 (1994). In addition, he or she did not make a statement against penal interest, and the police did not corroborate the information the CI said the friend provided. The friend remains enigmatic.

Because the affidavit does not provide a substantial basis for crediting the CI or the friend, the information provided by the CI and the friend cannot be considered credible. See *Satterwhite, supra*. As the affidavit does not sufficiently establish the reliability and basis of knowledge of the CI or information regarding the veracity of the friend, the information provided by the CI cannot be considered as a basis for probable cause to issue a search warrant. For the foregoing reasons, the affidavit in support of obtaining the search warrant failed to establish probable cause.

Good Faith Exception to the Exclusionary Rule.

[9] Pursuant to the good faith exception in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the evidence obtained pursuant to a search warrant based on insufficient probable cause need not necessarily be excluded. See *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). Compare *State v. Flores*, 245 Neb. 179, 512 N. W.2d 128 (1994) (where the Nebraska Supreme Court concluded that the affidavit did not support a finding of probable cause and held without written consideration of the good faith exception in *Leon, supra*, that the lower court erred in denying the defendant's motion to suppress).

[10] Pursuant to *Leon, supra*, suppression is an appropriate remedy if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate or judge wholly abandoned his or her judicial role; (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

In the present case, the warrant is based on an affidavit which sets forth historical information pointing toward drug-related activity and arms possession by Reeder. Although the current information supplied by the CI was based on information from the friend and is inadequate under the veracity standard established in informant cases, the information was not unreasonable, unbelievable, invalid, or obtained recklessly. Additionally, the friend, who by hearsay provided the evidence of recent possession and sale of cocaine by Reeder, was known to the other confidential informants in the affidavit as a cocaine user being supplied cocaine by Reeder.

Thus, although the affidavit may be lacking probable cause because of a lack of corroboration of the friend's information, the affidavit as a whole creates a good faith belief that Reeder was a drug dealer who had made a very recent sale to a known user and regular customer, i.e., the friend. Accordingly, we conclude that the evidence obtained during the search conducted pursuant to

the search warrant was admissible and need not be suppressed according to the good faith exception in *Leon, supra,* and the orders of the district court denying the motion to suppress and admitting the seized evidence are affirmed.

AFFIRMED.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

March 13, 1996

Marilyn B. Hutchinson
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-94-0848, State v. John M. Reeder

Appellee/Motion for Rehearing & Brf **filed** 02/09/96

has been reviewed by the court and the following order entered:

Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME
COURT AND COURT
OF APPEALS

IN THE DISTRICT COURT OF PLATTE COUNTY, NEBRASKA

State of Nebraska v. John M. Reeder
Case No. 3928, Bill of Exceptions at 81-82.

THE COURT: Mr. Naylor, you, I am sure, want to preserve any issues you might have by virtue of the court's previous ruling on your client's Motion to Suppress, is that correct?

MR. NAYLOR: That is correct, Your Honor, and even though a stipulation has been entered into between the defense and prosecution regarding the facts of this case, or most of the facts of this case for submission to the court, I would wish to renew my objection to the court's consideration of any evidence seized from the premises of the defendant at the time of an execution of a search warrant for that premises, as well as any evidence seized from the person of the defendant or the motor vehicle he was operating on the date of his arrest for the reason that those seizures [p. 82] violated the defendant's right to be free from unreasonable searches and seizures, a right guaranteed to him by the Fourth Amendment to the Constitution of the United States and Article 1, Section 7 of the Constitution of the State of Nebraska.

Those issues, as the court is aware, were previously litigated in a hearing on a Motion to Suppress. That Motion to Suppress was overruled, but I would renew those objections previously raised in the Motion to Suppress and ask that that objection be noted as continuing for purposes of this trial.

THE COURT: All right. Thank you. Your objections at this time to all said evidence as indicated, is noted by the court and will be deemed a continuing objection to said evidence throughout the course of this trial.

IN THE NEBRASKA COURT OF APPEALS

State of Nebraska v. John M. Reeder
Case No. A-94-848.

ASSIGNMENTS OF ERROR IN DIRECT APPEAL

Appellant asserts the following assignments of error:

1. The district court erred in overruling appellants Motion to Suppress filed on March 4, 1994.

2. The district court erred in receiving in evidence at trial, over appellant's objection, items seized as a result of the searches of appellant's residence and person which occurred on or about August 27, 1993.

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

State of Nebraska v. John M. Reeder
Case No. S-94-848.

Assignment of Error in PETITION FOR FURTHER REVIEW

The decision of the Nebraska Court of Appeals was in error for the reason that it incorrectly applied the "good faith exception" postulated in *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), to prevent exclusion of evidence obtained pursuant to a search warrant based on insufficient probable cause.

IN THE DISTRICT COURT OF PLATTE COUNTY, NEBRASKA

SEARCH WARRANT

(Filed Oct. 5, 1993)

TO: Investigator Galen D. Svoboda

WHEREAS, I AM SATISFIED THAT PROBABLE CAUSE EXI[S]TS FOR ISSUANCE OF A SEARCH WARRANT BASED UPON THE AFFIDAVIT AND THAT CERTAIN DESCRIBED PROPERTY:

Controlled substances, cocaine drug paraphernalia, records, telephone answering machines or other devices used to record messages or conversations, documents and money resulting from drug transactions, vehicles and devices of transportation of drugs, packaging materials for controlled substances, computers or other electronic devices and or other documentary evidence, electronic or otherwise, used to maintain records of drug transactions; weapons, firearms and ammunition; and scales used to weigh cocaine, and controlled substances or any other drug paraphernalia as defined by Nebraska State Statutes:

IS CONCEALED OR KEPT IN ON, OR ABOUT THE FOLLOWING DESCRIBED PERSON AND/OR PLACE:

John M. Reeder, W/M, DOB 04-15-48, RR#1, Box 91, and/or a converted, white, school house located approximately ten miles North on the Westside of the Monastery Road, the Northeast corner of the Northeast quarter, Section 31, Sherman Township, Columbus, Platte County, Nebraska; a red, 1979, Chevy, Van, NE25-G951 and any or all outbuildings, and vehicles located there upon.

AND IS UNDER THE CONTROL OR CUSTODY OF:

John M. Reeder, W/M DOB 04-15-48.

AND THAT THE PUBLIC INTEREST REQUIRES THAT THIS WARRANT BE A NO-KNOCK WARRANT AND THAT LAW ENFORCEMENT OFFICERS NEED NOT ANNOUNCE THEIR PRESENCE OR INTENTION PRIOR TO ENTRY.

THEREFORE YOU ARE COMMANDED, WITH THE NECESSARY AND PROPER ASSISTANCE, TO SEARCH THE ABOVE VEHICLES, DESCRIBED PLACE, PERSON(S) AND ANY OUTBUILDINGS FOR THE ABOVE DESCRIBED PROPERTY, AND IF SAID PROPERTY IS FOUND YOU ARE TO SEIZE THE SAME. THIS WARRANT SHALL BE SERVED DURING THE DAYTIME-NIGHTTIME AND THAT THIS WARRANT SHALL BE RETURNED TO

Platte County District Court.

WITHIN TEN DAYS OF ISSUANCE.

DATED THIS 26TH DAY OF SEPTEMBER, 1993.

AT 11:06 O'CLOCK P.M.

SIGNED: /s/ Robert R. Steinke
DISTRICT JUDGE

IN THE DISTRICT COURT OF PLATTE COUNTY, NEBRASKA

RETURN AND INVENTORY

(Filed Oct. 5, 1993)

STATE OF NEBRASKA, PLATTE COUNTY:

The undersigned, being first duly sworn, upon oath says that on September 26, 1993, at 2308 o'clock p.m., I executed the within warrant as directed there and I seized from the vehicle, place or person described in said warrant the following described property of which I am now in possession:

1. Cocaine snow-seal
2. ½ bottle of "Inosetol"
3. .22 Cal Ruger Bearcat revolver #90-18529 with 6 rounds
4. sack of assorted photographs
5. (2) snow-seals and (2) cut glossey [sic] pages
6. photo album and business card holder
7. white powder residue from carpet
8. approx. 32 grams of white powder
9. carpet sweepings
10. $50.00 bill
11. (9) photographs
12. open box of sandwich bags
13. note book
14. small brown bottle

15. discharge papers from Nebraska penal complex
16. tripple [sic] beam scale
17. (9) large fire crackers
18. (3) containers of assorted coins ($52.96)
19. wooden box of assorted coins ($179.20)
20. zip lock bag with white powder residue
21. 1975 Harley Motor cycle NE 25-MC-175, 9D1953OH5
22. 11 film canisters with 10 rolls exposed film
23. telephone bill
24. (2) magnetic audio tapes
25. small brown bottle
26. $1080.00 in U.S. currancy [sic] and assorted receipts

This inventory was made in the presence of applicant. Investigator James Kelly and SGT A. Walton and a copy of the warrant was left with John Reeder at the Platte County Jail and receipt for the property was left on the kitchen counter of the Reeder residence at RR 1, Box 91, Columbus, Platte County, NE.

/s/ Galen D. Svoboda
Signature of applicant
Investigator G. Svoboda

SUBSCRIBED AND SWORN BEFORE ME ON 5th of Oct. 1993 = 1:24 p.m.

/s/ Marlene M. Vetick - Clerk
Seal /s/ By Vonda M. Wallick, Deputy

IN THE DISTRICT COURT OF
PLATTE COUNTY, NEBRASKA.

STATE OF NEBRASKA)
) SS
COUNTY OF PLATTE)

AFFIDAVIT AND
APPLICATION
FOR ISSUANCE OF A
SEARCH WARRANT

(Filed Sep. 27, 1993)

The complaint and affidavit of Inv. Galen D. Svoboda, Drug Investigator for the Nebraska State Patrol, on this 26th day of September, 1993, who, being first duly sworn, upon oath says:

That I am a law enforcement officer with the Nebraska State Patrol assigned to work drug enforcement. In that capacity, affiant has received training from the Nebraska State Patrol in the form of a two week drug investigator school; from the DEA in the form of a basic drug investigator course as well as practical field experience regarding the investigation of offenses relating to the distribution and possession of controlled substances, including but not limited to: cocaine. Affiant has also had extensive investigative experience regarding these substances, having been involved in approximately 35 investigations regarding the same.

Affiant is aware from his training and experience and from information received from other law enforcement officers that individuals frequently keep cocaine on their persons; although if large amounts are possessed it is occasionally stored in residences, automobiles or at other

locations. Affiant further knows that the person responsible for distributing cocaine may give the person's source of cocaine to a third person to hold in order to prevent discovery of the cocaine on the distributor and that this is especially true when dealing with large quantity distributors. Affiant is aware also from his training and experience, and from information received from other law enforcement officers, that individuals involved in the possession and distribution of controlled substances, including but not limited to cocaine keep books, notes, letters and diaries; that possessors and distributors of cocaine deal strictly in cash and therefore will be carrying large sums of currency; that individuals engaged in the possession and distribution of cocaine frequently carry firearms or have firearms at their disposal to protect themselves from their customers and/or suppliers and to protect the large sums of money and/or their supply of drugs that they may be carrying on their person.

That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit:

Controlled substances including, but not limited to cocaine, drug paraphernalia, homemade or otherwise; telephone answering machines or other devices used to record messages or conversations; records, documents and money resulting from drug transactions; vehicles and other devices of transportation of drugs; scales used to weigh cocaine, or other controlled substances; packaging materials for controlled substances; computers or other electronic devices, and/or other documentary evidence, electronic or otherwise used to maintain records of drug transactions; weapons firearms and ammunition; and/or

any other drug paraphernalia as defined by Nebraska State Statutes.

That said property is concealed or kept in, on, or about the following described place or persons, to-wit: the person of John M. Reeder, W/M, DOB 04-15-48, RR #1 Box 91, Columbus, Platte County, Nebraska, a converted, white, school house located approximately ten miles North of Columbus, NE on the West side of the Monastery ___, the Northeast corner of the Northeast quarter, section 31, Sherman Township, Platte County, Nebraska; a red 1979 Chevy Van, Ne 25-G951, VIN# ___Gl159018608 and ___ all outbuildings and vehicles located there upon.

That said property is under the control or custody of John M. Reeder.

That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit:

1. That affiant received information from Investigator Ron Hilliges of the Nebraska State Patrol who was involved in a wire tap of John Reeder in 1983. Information from this wire tap indicated that John Reeder was involved in the distribution of large amounts of cocaine in the Columbus, NE area and that at that time one of Reeder's sources of cocaine was from Omaha, NE.

2. That affiant received information from Trooper Robert Henderson of the Nebraska State Patrol who interviewed Kurt A. Prokupek W/M, DOB 07-15-54, a resident of Columbus, NE, employed by Prokupek Shoes on 07-27-70 who agreed to cooperate with law enforcement. Prokupek stated that John Reeder is a supplier of drugs

in the Columbus, NE area and that Reeder was one of Prokupek suppliers of illegal drugs prior to Prokupeks arrest for delivery of controlled substances in Platte Co., Ne. Prokupek agreed to target Reeder and Prokupeks other sources but later backed out of the agreement to cooperate.

3. That your affiant received information provided by Officer D. Molezyk of the Columbus Police Department who had contact with a confidential informant hereinafter referred to as CI and known to Affiant, in November of 1992 who stated that John M. Reeder is a distributor of cocaine in the Columbus, NE area; Reeder goes and picks up his cocaine in Omaha, NE; CI has personal knowledge of Reeder picking up large amounts of cocaine in Omaha, NE on two occasions and then transporting the cocaine to Reeder's residence as indicated above with his Harley Davidson Motorcycle and a blue Chevy Convertible car; Reeder keeps his cocaine in several places including the garage; Reeder supplies cocaine to a person named "Wolfey" known to affiant as Randy Schaefer of Columbus, NE; Reeder also lives with a Jeff Warden W/M at this residence; Reeder likes to bury his money in the ground around the house; has a brother named Andrew Reeder who is keeping some of John Reeders drugs in the barn at Andrew Reeders house for John Reeder; that John Reeder uses a phone to conduct his transactions, however he talks in code and that CI last observed a large amount of cocaine at Reeders residence in September of 1992. Affiant considers CI reliable because CI has provided information in the past resulting in a search warrant being issued and executed for cocaine and that cocaine was in fact seized in Platte County

Nebraska as a result of this search warrant; that Randy Schaefer, "Wolfey", has had a search warrant executed on his residence in Columbus, NE on 04-03-93 for cocaine at which time cocaine was in fact seized and Schaefer arrested for possession with intent to deliver cocaine.

4. Affiant received information from CI402-D090, who was neither on probation, parole or has any current charges pending, in March of 1992 at which time CI stated that Reeder was a distributor of cocaine in the Columbus, NE area; that Reeder deals cocaine in large quantities; CI402-D090 has received cocaine from Reeder in the past; CI402-DO90 knows Reeder lives at the residence described above; that David Markovic of Columbus, NE gets cocaine from Reeder but that Markovic also deals in L.S.D. and marijuana. CI402-D090 also knows CI29-09-25-93 and the close personal friend of C129-09-25-93 and that they are getting cocaine from Reeder. Affiant considers CI402-D090 reliable because on 05-31-93 David Markovic was arrested for Delivery of L.S.D. in Platte County, Nebraska by affiant. A subsequent search warrant was issued for Markovics residence for other drugs at which time marijuana along with other narcotic drugs were seized from Markovics room. That Markovic, after his arrest agreed to cooperate with affiant in return for consideration of charges which the Platte County attorneys office was aware of. Markovic at this time told affiant that Reeder was a distributor of large amounts of cocaine, goes to Omaha, NE to get the cocaine and that Markovic has received cocaine from Reeder in the past and knows that the close personal friend of CI29-09-25-93 is currently getting cocaine from Reeder. Markovic agreed to target Reeder for affiant but later

backed out of the agreement for fear of retributition from Reeder who Markovic considered violent. Affiant received this information about Markovics drug dealings and information about an on going case involving distribution of cocaine in Platte County which has been corroborated by the Nebraska State Patrol prior to Markovics incident stated above.

5. Affiant received information from CI402-D080 that John Reeder is a large distributor of cocaine in the Columbus area and that in March, 1993, Reeder invited CI402-D080 to his residence ten miles North of Columbus, NE on the West side of the Monastary road, for a party. At this time, C1402-DO80 over heard Reeder tell Randy Schaefer to bring, "the other package" out to his place. When CI402-D080 was at Reeders residence Reeder got out a "vile" represented to CI402-080 as cocaine and provided CI402-080 with cocaine without measuring the cocaine off. CI402-080 stated that Reeder just placed small piles of cocaine on his hand and placed his hand with these piles under the nose of CI402-080. Randy Schaefer later arrived at which time Schaefer and Reeder went into Reeders bedroom. Schaefer then left Reeders residence and Reeder returned to the party. Shortly thereafter, Reeder ran out of cocaine and went into this same bedroom and retrieved a plastic bag containing what CI402-D080 believed to be approximately one eighth ounce of cocaine and provided CI402-D080 with cocaine by placing an unmeasured amount in a line on a table. CI402-D080 knows that the substance provided to CI by Reeder was cocaine based on past experience with cocaine. CI402-D080 also knows the close personal friend of CI29-09-25-93 and further states that this close personal

friend is heavily involved in the use of cocaine which is provided to this close personal friend by Reeder. Affiant considers CI402-D080 reliable because CI402-D080 who was not on probation or parole at the time of association with affiant, but had pending charges, agreed to cooperate with affiant and CI402-D080 has provided information on six occasions where drugs could be purchased and did in fact purchase these illegal drugs for affiant in a controlled situation on four of the six occasions. CI402-D080 has also provided testimony in an on going case that has aided Federal authorities in identifying individuals involved in the interstate transportation of marijuana and cocaine.

6. On 09-25-93, affiant received information from Sgt. Todd Thalken of the Columbus Police Department. Thalken had contact with CI29-09-25-93. At this time Thalken believed CI29-09-25-93 to be under the influence of alcohol because Thalken could smell the odor of an alcoholic beverage emitting from CI29-09-25-93. CI29-09-25-93 stated to Thalken, without being prompted or threatened, that there is an individual by the name of John Reeder who lives in an old school house North of Columbus, NE who deals in large quantities of cocaine and is currently in possession of approximately one pound of cocaine in his home. C129-09-25-93 stated to Thalken that C129-09-25-93 has purchased cocaine from Reeder in the past but is currently trying to quit using cocaine; that Reeder often goes to Omaha, Ne to a place that fixes motorcycles to get cocaine; that Reeder keeps the cocaine well hidden in his bedroom; Reeder does not use scales to measure off cocaine but, "eyeballs it" and if you want the cocaine weighed off you have to bring your

own scale. C129-09-25-93 stated that Reeder told C129-09-25-93 that if his place was ever searched it would require a drug dog; that Reeder has threatened people in the past who may give information about his dealings to the Police; and that Reeder has boasted that he has a woman who works in the Platte County Courthouse who knows about search warrant affidavits and informs Reeder about the affidavits. Thalken states that C129-09-25-93 did not actually see this one pound of cocaine but spoke to a close personal friend, who C129-09-25-93 named to Thalken and is known to affiant. This close personal friend told C129-09-25-93 that this close personal friend purchased cocaine from John Reeder, at his residence, on 09-23-93 and that Reeder had a "rock" of cocaine about one pound in size. Thalken states that Thalken has know C129-09-25-93 for many years and that C129-09-25-93 has never made false statements to Thalken before but that C129-09-25-93 has never provided substantial information in the past. C129-09-25-93 also told Thalken that this close personal friend would not assist in any investigation and should not be contacted.

7. Affiant knows that this close personal friend of CI29-09-25-93 is the same individual mentioned above by CI402-D080, CI402-D090 and David Markovic.

8. Since June, 1992 affiant has at different times of the day or night, visually observed a red, 1979 Chevrolet van bearing Nebraska license plate 25-G951 parked at what has been called John Reeders residence as stated above and have found through the Nebraska Motor Vehicles File that the license plate belongs to an individual

known as John M. Reeder with an address of RR2, Columbus, NE.

9. Affiant has obtained the telephone number listed to the address as stated above and has found that the phone number, 402-564-1207 is assigned to a Jeff Wardenberg. Affiant also obtained phone tolls from this phone number which has revealed that this phone number has been used to contact Cory Reeder, Prokupek Shoes and Shoe Repair, Andy W. Reeder, Gerald L. Reeder and Apache Insulation Company. There are also numerous phone calls to the Omaha, NE to unidentified numbers. Affiant has been advised by Sgt. Thalken of the Columbus Police Dept. that Andy Reeder is a brother to John Reeder and as of this date Sgt. Thalken is unaware of any legitimate employment by John Reeder.

10. Affiant received information from Deputy James Fairchild of the Platte County Sheriffs Office on 09-25-93 who knows two of John Reeders family members. These family members have advised Fairchild, on an unknown date, that John Reeder is very violent, carried a pistol and used to intentionally beat up his sister strictly for the purpose of leaving bruises and marks on her body.

11. Affiant obtained a criminal history on John, Michael Reeder, W/M, DOB 04-15-48 which reveals that Reeder was arrested for Assault on 08-16-67 by the Buffalo County Sheriffs Office in Nebraska. Reeder was convicted and paid a fine. Reeder was also arrested for Felony Narcotics on 12-15-83 by the Lancaster County, Nebraska Sheriffs office. Reeder was found guilty of Deliver of Controlled Substances and was sentenced to 30 months to 3 years confinement.

That the above does constitute grounds of probable cause for the issuance of a search warrant to search the premises located in the Northeast corner of the Northeast quarter of Section 31, Sherman Township, a converted school house located ten miles North of Columbus, Platte County, Nebraska on the West side of the Monastery Road and any person found therein and vehicles used by said persons for the following items: controlled substances, including but not limited to cocaine; any documentary evidence relating to the distribution of controlled substances, including but not limited to notes, books, letters and diaries; any proceeds attributable to the distribution of cocaine or any other controlled substances including but not limited to United States currency and personal property; any firearms, weapons or ammunition; any evidence of occupancy; and any other item which constitutes evidence of the possession manufacture, sale or delivery of controlled substances and authorizing and directing seizure of the same.

That the public interest requires that this Search Warrant should be served anytime.

Affiant further states that the public interest requires that this Search Warrant should not be restricted and that law enforcement officers executing this Warrant should not be required to knock and announce their presence prior to entry into the premises due to the fact that, based upon affiant's previous experience and training, affiant knows that the evidence sought is easily destroyed, consumed or removed during the short period of time required for officers to knock and announce their presence and purpose prior to entry; further that there are firearms in the residence and that James Reeder has been

arrested and convicted of assault and further that statements made by close family relatives indicate the propensity for violence.

FURTHER AFFIANT SAYETH NAUGHT.

WHEREFORE, he prays that a Search Warrant be issued according to law.

/s/ Galen D. Svoboda
Nebraska State Patrol

SUBSCRIBED AND SWORN TO before me this 26th day of September, 1993.

/s/ Robert R. Steinke
/s/ District Judge
Title

(Ground and reasons for issuance of search warrant continued from front side)

IN THE DISTRICT COURT OF
PLATTE COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, -vs- JOHN M. REEDER, Defendant.	)	Case No. 3928 MOTION TO SUPPRESS EVIDENCE (Filed Mar. 4, 1994)

COMES NOW defendant, John M. Reeder, by and through his attorney of record, Kirk E. Naylor, Jr., and pursuant to the provisions of *Neb. Rev. Stat.* § 29-822 (Reissue 1989), moves this Court for an order suppressing as evidence at the trial of this matter any and all items seized from the residence of defendant, from the person of defendant, and from a red 1979 Chevrolet van owned by defendant, all of said searches and seizures having been carried out by law enforcement officers on or about September 27, 1993.

In support of said motion defendant alleges as follows:

1. That the searches and seizures complained of herein were undertaken pursuant to a search warrant issued by the District Court of Platte County, Nebraska, dated September 26, 1993.

2. That the sole basis for the issuance of said warrant was a written statement signed by Gaylen D. Svoboda, an investigator for the Nebraska State Patrol. Further, that said statement by Gaylen Svoboda was not sufficient to justify the issuance of said search warrant for

the reason that said statement is not a written affidavit as required by the provisions of Neb. Rev. Stat. § 29-814.04 (Reissue 1989).

• • •

5. That the statement of Galen Svoboda fails, on its face, even if the information therein is considered accurate, to establish probable cause to believe that contraband would be located at the premises of defendant, or in his motor vehicle identified herein, on the date said search warrant was issued.

WHEREFORE, defendant, John M. Reeder, prays that the Court suppress and exclude from use against defendant at his trial, any and all items of evidence which were seized by virtue of the search warrant issued by this Court on September 26, 1993, for the reason that said searches and seizures violated defendant's right to be free from unreasonable searches and seizures as guaranteed to him by the Fourth and Fourteenth Amendment to the Constitution of the United States of America, and by Article I, Section 7, of the Nebraska Constitution.

JOHN REEDER, Defendant

By: /s/ Kirk E. Naylor, Jr.
Kirk E. Naylor, Jr., #13013
Attorney for Defendant
1111 Lincoln Mall, Suite 300
Lincoln, Nebraska 68508
(402) 474-5529

IN THE DISTRICT COURT OF PLATTE COUNTY, NEBRASKA

State of Nebraska v. John M. Reeder
Case No. 3928

EXHIBITS:

1. Certified Copy Search Warrant
2. Snow Seal
3. Magazine pages
4. Snow Seal
5. Box – sandwich bags
6. Bottle of Inositol
7. Triple beam scale
8. Envelope – $1,080
9. Revolver
10. Paper bag – cocaine
11. Stipulation